

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1936.

No. 6668

853

RUTH FLEMING, APPELLANT,

vs.

MARION FISK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 14, 1936

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United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

a Supreme Court of the District of Columbia.

Law No. 84254.

RUTH FLEMING, *Plaintiff*,

v.

MARION FISK, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed July 20, 1934.

In the Supreme Court of the District of Columbia.

Law No. 84254.

RUTH FLEMING, *Plaintiff*,

v.

MARION FISK, *Defendant*.

First Count.

The plaintiff, Ruth Fleming, sues the defendant, Marion Fisk, for that on, to wit, the 18th day of October, 1916 the plaintiff was lawfully united in marriage to one Harry Fleming and since said date has continued to be and she now is the lawful wife of the said Harry Fleming; that at all times prior to the wrongful acts of the defendant hereinafter set forth the plaintiff and her said husband lived happily and peacefully together; that the defendant wrongfully, unlawfully, wickedly and intentionally contriving and intending to injure the plaintiff and deprive her of the affections and consortium of her said husband, on divers occasions between to wit, April 29, 1932, and, to wit, January

7, 1934 did take undue interest in the personal and business affairs of said Harry Fleming, did seek the society and companionship of the said Harry Fleming, did entice the said Harry Fleming from the society and company of the plaintiff, did entertain the said Harry Fleming at her home and elsewhere, did give the said Harry Fleming a purse and numerous other gifts, inducing the plaintiff's husband to transfer his love and affections and society from the plaintiff to the defendant and did speak ill of, disparage and criticize the plaintiff to the said Harry Fleming; that by such acts the defendant wrongfully, maliciously, unlawfully and intentionally alienated and destroyed the affections

2 of the said Harry Fleming theretofore existing for the plaintiff and caused the plaintiff and said Harry Fleming to become separated, on to wit, April 29, 1932; and that by reason of the aforesaid wrongful acts of the defendant the plaintiff has been deprived of the affections and consortium of the said Harry Fleming, her home been destroyed, and she has suffered, and hereafter will suffer, great distress in body and anguish of mind all to her great damage.

WHEREFORE the plaintiff brings this suit and claims the sum of \$20,000.00 besides costs.

Second Count.

The plaintiff, Ruth Fleming, further sues the defendant Marion Fisk, for that on, to wit, the 18th day of October 1916, the said plaintiff was lawfully united in marriage to one Harry Fleming and since said date the plaintiff has continued to be and she now is the lawful wife of the said Harry Fleming; that at all times prior to the wrongful acts of the defendant hereinafter set forth the plaintiff and her said husband lived happily and peacefully together; that on, to wit, January 7, 1934, the plaintiff did find her husband at the premises 3314 Mount Pleasant St. N. W. in the city of Washington, District of Columbia; that by reason of the defendant being then living at these premises; that by reason of the said wrongful acts of the defendant the home of the plaintiff has been broken up, her conjugal happiness has been destroyed and she has suffered, and hereafter she will suffer, great mental anguish, humiliation, embarrassment, and loss of social position all to her great damage.

WHEREFORE she brings this suit and claims the sum of \$20,000.00 besides costs.

3

Third Count.

The plaintiff, Ruth Fleming, further sues the defendant Marion Fisk, for that on, to wit, the 18th day of October 1916, the said plaintiff was lawfully united in marriage to one Harry Fleming and since has continued to be the lawful wife of said Harry Fleming; that at all times prior to the wrongful acts of the defendant hereinafter set forth the plaintiff and her husband lived happily and peacefully together; that on, to wit, the defendant did induce the plaintiff's husband to leave the plaintiff and the children of their marriage and go to the District of Columbia and reside away from his wife and caused the plaintiff and her husband Harry Fleming to become separated; and that by reason of the aforesaid wrongful acts of the defendant the plaintiff has been deprived of the affections and consortium of the said Harry Fleming, her home has been destroyed, and she has suffered, and hereafter she will suffer, great distress in body and anguish of mind all to her great damage.

WHEREFORE the plaintiff brings this suit and claims the sum of \$20,000.00 besides costs.

BACHRACH, HARRIS & PERUZZI
WILLIAM A. BACHRACH,
Attorney for Plaintiff.

Pleas.

Filed August 11, 1934.

* * * * *

Plea to First Count.

Comes now the defendant, Marion Fisk, by her attorney, Milford F. Schwartz, and for plea to the First Count of the Declaration herein, admits that the plaintiff was married to and is the lawful wife of one Harry C. Fleming, as alleged, but denies each and every other allegation therein contained.

4

Plea to Third Count.

Comes now the defendant, Marion Fisk, by her attorney, Milford F. Schwartz, and for plea to the Third Count of the

Declaration herein, admits that the plaintiff was married to and is the lawful wife of the said Harry C. Fleming, as alleged, but denies each and every other allegation therein contained.

MILFORD F. SCHWARTZ,
Attorney for Defendant.

Note of Issue.

Filed October 3, 1934.

* * * * *

WILLIAM A. BACHRACH, and
HARRY H. BETTELMAN, *Attorneys for plaintiff.*
MILFORD F. SCHWARTZ *Attorney for defendant.*

Memoranda

OCTOBER 10—1935.

Jury sworn and respited.

OCTOBER 14—1935.

Trial resumed, Same Jury. Verdict for Defendant against Plaintiff by direction of Court.

5 Supreme Court of the District of Columbia.

Saturday, October 19, 1935.

Session resumed pursuant to adjournment, Hon. JOSEPH W. COX, Justice, presiding.

* * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause, it is so ordered.

Wherefore, it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff her costs of defense to be taxed by the clerk and have execution thereof.

Memoranda.

OCTOBER 22—1935.

Appeal noted in open court by plaintiff from judgment of October 19, 1935. Bond fixed at \$100 or \$50 cash.

OCTOBER 29—1935.

\$50 deposited in lieu of bond on appeal.

NOVEMBER 8—1935.

Time to file Bill of Exceptions extended to and including January 10, 1936.

JANUARY 8—1936.

Proposed Bill of Exceptions filed.

6

Assignment of Errors.

Filed January 8, 1936.

* * * * *

Comes now the plaintiff Ruth Fleming, by counsel, and assigns as errors committed by the Trial Court the following:

I. In granting the motion of counsel for the defendant to direct a verdict of the jury for the Defendant at the conclusion of the taking of all testimony.

II. In directing the jury to find its verdict for the Defendant at the conclusion of the taking of all testimony.

III. In directing a verdict for the defendant at the conclusion of the taking of all of defendant's testimony, which was merely a Denial of the plaintiff's testimony, after a prior refusal by the Trial Court to direct a verdict for the defendant at the conclusion of the plaintiff's case.

IV. In ruling as a matter of Law and directing a verdict for Defendant at the conclusion of the taking of all the testimony, that the acts of the defendant adduced by the plaintiff's testimony did not constitute Acts of Aggression on the part of Defendant sufficient to establish a prima facie case for submission to the jury.

V. In refusing to permit a witness appearing for the plaintiff to testify as to whether said witness heard the plaintiff speak to the defendant over the telephone. (Mrs. Sanger.)

WM. A. BACHRACH,
HARRY H. BETTELMAN,
Attorneys for Plaintiff.

Service of copy of Assignment of Errors acknowledged this 7th day of January, 1936.

MILFORD F. SCHWARTZ,
Attorney for Defendant.

7

Memorandum.

FEBRUARY 4—1936.

Time to file transcript of record in Court of Appeals extended from day to day to and including March 15, 1936.

Supreme Court of the District of Columbia.

Wednesday, March 11, 1936.

Session resumed pursuant to adjournment, Hon JOSEPH W. COX, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, the plaintiff by her attorneys submits to the Court her Bill of Exceptions taken at the trial of this cause and prays that the same be signed and made of record, *nunc pro tunc*, which is hereby accordingly done.

Designation of Record.

Filed November 8, 1935.

* * * * *

The plaintiff designates to constitute her record on the appeal heretofore noted in the above-entitled cause, the following:

1. Declaration.
2. Plea to first and third counts.
3. Note of Issue.
4. Memorandum of swearing and respiting jury.
5. Verdict for defendant.
6. Judgment for defendant.
7. Memorandum of notation of appeal and the giving of and approval of appeal bond.
8. Memorandum of extension of time to file Bill of Exceptions.
- 8 9. Bill of Exceptions filed, submitted, and approved.
10. Assignment of Errors.
11. This designation.

WILLIAM A. BACHRACH,
HARRY H. BETTELMAN,
Attorneys for Plaintiff.

Service accepted.

MILFORD A. SCHWARTZ,
Attorney for Defendant.

9 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 8, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part

of this transcript, in cause No. 84254 at Law, wherein Ruth Fleming is Plaintiff, and Marion Fisk is Defendant, as the same remains upon the files and of record in said court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of March, 1936.

FRANK E. CUNNINGHAM, *Clerk.*

By CHAS. D. COFFIN,

Assistant Clerk.

(SEAL)

10 In the Supreme Court of the District of Columbia.

Law No. 84,254.

RUTH FLEMING, *Plaintiff,*

VS.

MARION FISK, *Defendant.*

Bill of Exceptions.

Be it remembered, that in the Supreme Court of the District of Columbia, holding a Circuit Court, on to wit, the 10th, 11th, and 14th days of October, 1935, the above cause came on for hearing on the merits before Justice Joseph W. Cox before a jury, and being present on behalf of the plaintiff, Ruth Fleming, were William A. Bachrach and Harry H. Bettelman, her counsel; and on behalf of the defendant, Marion Fisk, there appeared Milford F. Schwartz, her counsel.

Thereupon and thereby, William A. Bachrach of counsel for the plaintiff, made the opening statement to the Court and jury, whereupon counsel for the defendant moved the Court to Direct a Verdict for the defendant, which motion was denied by the Court.

Thereupon the plaintiff, **Ruth Fleming**, to maintain the issues on her part took the stand and testified in her own behalf as follows: That plaintiff was married to Harry Fleming on the 18th day of October, 1916; that she has since then and to the present day been lawfully married to Harry Fleming and that he had been a dutiful husband up to 1932; that in 1921, she, her husband and their children moved into the home of the mother of the defendant in Kensington, Maryland wherein the defendant resided; that plaintiff's husband at that time began taking the defendant in his automobile to defendant's place of employment in

the City of Washington and that on several occasions the defendant's father accompanied them; that about two or three months thereafter the plaintiff, her husband and family moved from the home of the defendant's mother to their own home in Kensington, Maryland; that plaintiff's husband continued to take defendant in the mornings from Kensington to defendant's place of employment in the City of Washington; that in 1922 the defendant gave a picture of herself to the plaintiff's husband, that in 1923 plaintiff
11 tiff went to hospital for the delivery of her present youngest son, and that while she was so confined, the plaintiff's husband and the defendant came together on one occasion to visit the plaintiff during her confinement; that on October 3rd, 1924, the plaintiff's husband received a letter from the defendant who was attending college in the State of Ohio, which letter stated that the defendant was lonesome for and missed the plaintiff's husband and that defendant urged plaintiff's husband to send her flowers and candy since other girls at college were receiving gifts from their boy friends, and that unless she heard from him she would have to return because she could not bear to be away from him without hearing from him; that plaintiff's husband showed plaintiff said letter and remarked that he didn't know what to do about it; that thereupon the plaintiff and her husband conferred as to the proper thing to do about the letter; whereupon plaintiff's husband wrote a letter to the defendant, in the presence of the plaintiff, stating that he was happy without the defendant and wished to be left alone and that he advised defendant to interest herself in other men, and that at this time the plaintiff's husband asked permission of plaintiff to use the salutation of "Dear Marion" in said letter; that plaintiff mailed said letter to the defendant in care of defendant's brother in Ohio, this testimony was admitted over objection and exception of the defendant; that in the year 1926, plaintiff, her husband and family moved to Hyattsville, Maryland, where they resided until April, 1932 when the plaintiff's husband deserted her and left her in very destitute circumstances; that prior to the time that plaintiff's husband left plaintiff, the defendant gave a purse to plaintiff's husband, that from 1921 to 1932 plaintiff on numerous occasions remonstrated with her husband because he was going with the defendant; that the last time

plaintiff and her husband had sexual intercourse was in February of the year 1932; that plaintiff's husband moved to another room; that prior to the summer of 1932 the defendant telephoned to the plaintiff's home on several occasions seeking to speak to plaintiff's husband and that during these telephone calls plaintiff asked the defendant to leave her husband alone and that the defendant would then hang up the receiver; that on one or two occasions in 1930 the plaintiff phoned the defendant at her home asking the defendant to stay away from her husband, where-
12 upon the defendant would hang up the receiver and refuse to listen; that in the summer and fall of 1933 the plaintiff on numerous occasions followed her husband from his place of employment in the City of Washington to places where the defendant was and that plaintiff's husband and defendant then went to public eating places and dined together; that in the evening of January 5, 1934 the plaintiff saw her husband call for defendant in front of an interior decorating school at 18th and M Streets, Northwest, from where they went to the defendant's apartment at 3314 Mt. Pleasant Street, Northwest, wherein the plaintiff's husband and defendant entered and remained for several hours; that on the night of January 7, 1934, the plaintiff again saw her husband and the defendant enter the defendant's apartment and remain there for several hours and plaintiff remained at the door of defendant's apartment listening to the following conversation which she heard: Defendant said to plaintiff's husband "The bill for the Readers Digest and the bill at Hecht's must be paid," whereupon Harry Fleming replied "I have to send six dollars to my wife," whereupon the defendant replied "Don't give her a penny, these bills have to be paid first", then later on Harry Fleming said to the defendant, "You can do it better if you remove your girdle" and later Harry Fleming was heard to kiss the defendant; That about 10 o'clock that evening Harry Fleming and the defendant came out of defendant's apartment and saw the plaintiff standing at the door of defendant's apartment; that thereupon an argument ensued between the defendant and the plaintiff wherein the defendant said to plaintiff's husband that plaintiff was no longer the wife of Harry Fleming and that he shouldn't give her any money and that the plaintiff had no right to follow her husband, that the defendant

while wiping with her handkerchief the face of the plaintiff's husband, which was bleeding as a result of an encounter between himself and his son at that time, said "Oh you have hurt my poor Harry" and defendant then struck son of plaintiff; that plaintiff's husband ran downstairs from the defendant's apartment out of the building into the street and defendant ran after him and tried to restrain him from leaving; that on June 24th, 1935, the plaintiff saw her husband and the defendant together with a woman who was defendant's cousin alight from the gangplank of a steamer of the Norfolk-Washington Steamboat Co., which boat
13 had just arrived from Norfolk; that plaintiff approached the defendant and plaintiff's husband and said to the defendant, "Now that you have broken up my home I hope you are happy." Whereupon the defendant replied "I'm the happiest woman in the world," whereupon the plaintiff turned and said to her husband, "If you had sent me money on Saturday I wouldn't be here this morning," whereupon the defendant said to plaintiff's husband "If money is all she wants, for land's sake give it to her and get rid of her;" that plaintiff made inquiry of the purser of the boat as to the rooms Harry Fleming and Marion Fisk occupied on said boat, and as a result thereof plaintiff went to room 124, which had been occupied by two people, and therein found a towel and tissue paper with lipstick marks thereon, said towel and tissue paper being admitted in evidence and marked plaintiff's exhibit No. 1.

Upon cross-examination by Mr. Schwartz, defendant's attorney, the plaintiff testified that she had said on direct examination that her marriage had been happy until 1932, but that now she wanted to change that; that for a number of years prior thereto he had beaten her; that she had filed suit in Maryland against her husband but did not mention Miss Fisk's name because she did not have proof and whereupon she was asked whether or not she had any more now and she answered 'no'; that she had called the home of the defendant during the funeral of defendant's father to find out if her husband was there; that witness was thereupon shown plaintiff's exhibit No. Three which she identified as a copy of a suit she had previously filed in Maryland; that counsel for plaintiff thereupon interrupting the cross-examination offered the same in evidence as plaintiff's exhibit aforesaid and read the same to the Jury as follows:

Pl. x #3 *Authentication of Record.*

Clerk's Office, Circuit Court for Prince George's County,
Maryland.

I, BRICE BOWIE, Clerk of said Court, do hereby certify that the writings annexed to this certificate are true copies of original Bill for Divorce a mensa et thoro. In Equity #8605, on file and of record in said office.

WITNESS, my hand and the seal of said Court this 9th. day of October, 1935.

BRICE BOWIE (s.) *Clerk.*

I, JOSEPH C. MATTINGLY, Associate Judge of said Court, do certify the foregoing attestation by Brice
14 Bowie, Clerk of the said Court, to be in due form, and by the proper officer.

WITNESS, my hand and seal this 9th. day of October, 1935.

JOSEPH C. MATTINGLY (Seal)

I, BRICE BOWIE, Clerk of said Court, hereby certify that Joseph C. Mattingly, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting same, Associate Judge of said Court, duly commissioned and qualified.

WITNESS, my hand and seal of said Court this 9th. day of October, 1935.

BRICE BOWIE (s.) *Clerk.*

SEAL

In the Circuit Court for Prince George's County,
Maryland.

Equity No. 8605.

RUTH V. FLEMING, *Plaintiff,*

v.

HARRY C. FLEMING, *Defendant.*

Bill for Divorce A Mensa Et Thoro.

To the Honorable Judges of said Court:

The petition of your oratrix, Ruth V. Fleming, respectfully represents:

1. That she is a citizen of the United States and a resident of Prince George's County, Maryland, where she has resided continuously for more than five years last past.

2. That the defendant, Harry C. Fleming, was a resident of Prince George's County, Maryland, continuously for more than five years, where he resided with your oratrix until the 30th day of April, 1932, at which time the defendant, without just cause, reason or excuse, abandoned and deserted your oratrix at Prince George's County, Maryland, and moved into the City of Washington, District of Columbia, where he has resided continuously ever since.

3. That your oratrix and the defendant were married on the 18th day of October, 1916, at Annapolis, Maryland, by the Reverend George R. Savage, a Minister, duly authorized to solemnize the marriage ceremony, as will be seen in the original marriage certificate herewith filed as a part here-

15 of, and marked plaintiff's exhibit No. 1; that as a result of said marriage of your oratrix and the defendant three children were born, named William Herbert, aged 14, Lewis Wilson, aged 12, and Harry Cornelius, aged 9, all of whom are now in the custody and care of your oratrix in Prince George's County, Maryland.

4. That although your oratrix always conducted herself in a chaste and proper manner, performed all the duties of a wife, properly looked after her home and cared for the children, nevertheless the defendant ignored, humiliated and ill-treated her, and on numerous occasions he committed brutal assaults on her and had constantly committed brutal assaults on William Herbert Fleming, the oldest child of your oratrix and the defendant, and on several occasions assaulted him so severely that it caused him to bleed as a result thereof.

5. That as a result of the excessive, vicious conduct exhibited by the defendant towards your oratrix and his constant efforts to do her bodily injury and harm, she says she is afraid to return and live with the defendant, and says that the desertion of her by the defendant on the 30th day of April, 1932, is final, complete and is beyond hope or a reasonable expectation of a reconciliation.

6. That for the last year the defendant has failed and refused to properly clothe or support your oratrix and their minor children, and has failed and refused to furnish them with the necessities of life as a result of such failure on the

part of the defendant, your oratrix and their said minor children have been forced to seek the aid of charitable organizations and friends in order that they may receive the necessities of life.

7. That the defendant is not a proper and suitable person to have the care and custody of said minor children.

8. That the defendant is not now contributing, and has not, for sometime past, contributed, anything to the support of your said oratrix or their said minor children, and that your oratrix is earnestly endeavoring to find employment in order that she may in some measure supply herself and said minor children with the necessities of life.

9. That on the 30th day of April, 1932, at which time the defendant abandoned and deserted your oratrix and their home, she and their minor children were evicted
16 therefrom because the defendant failed and refused to pay the rent, and that at which time the furnishings of the house and personal belongings of your oratrix and their children were placed outside the house, and your oratrix and their children were forced to seek shelter and charitable aid from a neighbor.

10. That the defendant seldom spent the evenings at home, constantly remaining away from home until the early hours of the morning, and that when he would return he would refuse to tell your oratrix where he had been; and on one occasion the defendant returned home about two o'clock in the morning, bringing with him a loaded revolver, at which time he again threatened to do your oratrix great bodily harm; and at the first opportunity your oratrix took the revolver and hid it; and that shortly thereafter your oratrix found in the pocket of a vest of the defendant used by him, in a suspicious envelope, a number of rubber articles which she was advised were only used by a man when having intercourse with a woman to avoid pregnancy, and such rubber articles were never used at any time when the defendant had intercourse with your oratrix; and that since your oratrix discovered such rubber articles she became convinced that the defendant was having unlawful intercourse with other women, and as a result thereof, for the past year she has failed and refused to have such intercourse with the defendant.

To the end, therefore,

1. That your oratrix may be divorced a mensa et thoro from the defendant, Harry C. Fleming.

2. That pending this suit and permanently thereafter the custody of said minor children may be awarded to your oratrix;

3. That pending this suit the defendant be compelled to pay your oratrix for her maintenance, and for the care and maintenance of the said minor children; a fixed and stated amount, and a reasonable amount of counsel fees for the counsel of record of your oratrix;

4. That upon the final determination of this case the defendant be required to pay unto your oratrix a fixed sum as alimony, as well as a fixed sum for the support and maintenance of said minor children, and reasonable counsel fees to counsel of record of your oratrix; And for such other and further relief as to the Court may seem
17 mete and proper.

May it please your Honors to grant to your oratrix and order of publication to be issued out of this Court in the usual form, directed to said Harry C. Fleming, a non-resident of the State of Maryland, advising him of the purpose and object of this suit, and commanding him to be and appear in this Court on some certain date to be entered therein to answer the premises of this bill of complaint, and abide by and perform such decrees or orders as may be passed herein.

RUTH FLEMING,
Plaintiff.

CLARENCE M. ROBERTS,
Attorney for Plaintiff.

J. A. SWEENEY,
Attorney for Plaintiff.

STATE OF MARYLAND,
Prince George's County, ss:

I hereby certify that on this 3rd day of June, A. D. 1932, before me a Notary Public in Prince George's County, Maryland, Personally appeared before me Ruth V. Fleming, the plaintiff in the above entitled cause, and made oath in due form of law that the matters and things set forth and stated in the foregoing bill of complaint, of her per-

sonal knowledge are true, and those stated therein on information and belief she believes to be true.

W. HAMPTON HICKEY,
Notary Public.

(CLARENCE M. ROBERTS,) *Attorney for Plaintiff.*

J. A. SWEENEY,
Attorney for Plaintiff.

I HEREBY CERTIFY, That on this Eighteenth day of October, One Thousand Nine Hundred and Sixteen, at Annapolis, Maryland, Harry C. Fleming were by me united in and Ruth V. Tatem

Marriage in accordance with the License issued by the Clerk of the Circuit Court for Anne Arundel County, in the State of Maryland.

(U. S. Rev. 10 cents).

GEORGE R. SAVAGE,
Clergyman.
(Official Character)

Filed July 7th, 1932.

“That she did not have the letter that Miss Fisk wrote to her husband nor did she have the picture that she gave him and when asked why she had not kept the picture, said her husband had hidden it; whereupon she was asked if she had ever said anything to her husband about the picture and she said that started an argument between
18 her husband and herself; that she had never seen her husband in the car alone with Miss Fisk, but she knew that defendant's father was going to work with them as well as other people in the family and neighbors; when asked why the letter was not produced she said that she did not have it, that Mr. Fleming had burned it and that she made no effort to get it; that Room 124 on the Norfolk and Washington boat had been occupied by two people and Room 126 by one person. That she did not know who stayed in either room; that Miss Hubbell alighted from the gangplank; that Mrs. Christianson lives in Boston and is just here for the trial.”

Whereupon **William Fleming**, the oldest son of the plaintiff was sworn and called to the stand and testified as follows in behalf of the plaintiff: That when he was about six

years of age which was in the year 1923, while he and the rest of the family were living at the home of the mother of the defendant, wherein the defendant resided in Kensington, Maryland, that he and his younger brother were in the livingroom of the Fisk house one evening when Mr. Fleming and the defendant were seated alone and that the defendant's mother asked him and his brother to leave the livingroom, defendant's mother saying at that time "Get out of here and leave Marion and your father alone" over the objection and exception of the defendant; that in 1930 or 1931, he heard (two) arguments between his parents concerning the defendant; that in 1923 when his mother went to the hospital to give birth to his youngest brother, his father wanted to send the children to the home of Mrs. Fisk to remain, and that his mother objected very strenuously to such arrangement but that the father prevailed; that in 1929 or 1930 while his father was engaged in business in Hyattsville, a woman used to telephone his father; that on January 7, 1934 he was present with his mother in the hallway of the apartment of the defendant at 3314 Mt. Pleasant Street, N. W., in the City of Washington, at which time he overheard the following conversation between the defendant and plaintiff's husband while in the defendant's apartment that night, defendant said to Harry Fleming, "The bill for the Reader's Digest and Hecht's have to be paid" whereupon Harry Fleming replied "I have to send my wife six dollars," to which the defendant replied "You can't send your wife any money because these bills have to be paid first," that later on that same night while defendant and plaintiff's husband were still in the apartment of the defendant he heard his father say to defendant "You can do it better if you remove your girdle;" that later on that same night the defendant and his father came out of the apartment and found him together with his mother and another woman at the door of the defendant's apartment; that an argument then occurred between him and his father, whereupon he struck his father; that he heard defendant say to his father that his mother was no longer his father's wife and that she had no business following him; that the defendant embraced his father and while wiping his father's face with her handkerchief said, "Oh you have hurt my poor Harry" and that the defendant thereupon struck him; that his father ran from the

building with defendant following him and she tried to keep plaintiff's husband from leaving.

Whereupon William Fleming was cross-examined by Milford F. Schwartz, attorney for defendant, and his testimony upon cross examination was, "that he had not seen her, Miss Fisk, for a number of years; had never spoken to her since he was six years old; that he is now eighteen years old; that almost ten years later he recognized her voice although he had never spoken to her on the phone; that the incident when Mrs. Fisk asked him to leave his father and Marion alone took place twelve years ago but that he remembered it; that in the hallway of the apartment on Mt. Pleasant Street his father held him when Miss Fisk hit him; that he is angry with his father; that he remembers some mention having been made during the Mt. Pleasant Street incident, about Miss Fisk's father.

Whereupon Lewis Fleming, a son of the plaintiff was sworn and took the stand and testified in behalf of the plaintiff as follows: "That he is 16 years of age and remembers the occasion in 1923 in the home of the mother of the defendant in Kensington, Maryland, when the Flemings were living at the Fisk's home; that Mrs. Fisk, the mother of the defendant, on one occasion one evening, told him and his brother to get out of the livingroom and leave his father and Marion Fisk alone; that in 1930 while he was at home in Hyattsville a woman phoned and asked where his father could be reached and he gave her a telephone number to call; that his father subsequently reprimanded him for giving his phone number to anybody; that on several
20 occasions in 1933 he saw his father and Marion Fisk go to restaurants in the City of Washington in the evenings and dine together, and that they dined at Scholl's Cafe on one or two occasions.

Whereupon Lewis Fleming was cross-examined by Milford F. Schwartz, attorney for defendant, and his testimony on cross examination was, "That he was three years old when the incident took place in the parlor; that he is now sixteen years old but remembers the occurrence; that he heard a voice over the telephone and identified it as Miss Fisk's; that he had not seen her for about twelve years up to the time that the call came in nor had he heard her voice; that his father had told him not to give his telephone number to anybody".

Whereupon **Mr. Maxwell**, of the Norfolk & Washington Steamboat Company was sworn and testified as follows in behalf of the plaintiff: That from the original chart of the purser of their boat which left Norfolk in the evening of June 23, 1935, and arrived in Washington on the 24th. day of June, 1935, said chart showed that stateroom 124 was assigned to Harry Fleming and stateroom 126 was assigned to Marion Fisk; that these staterooms are next to each other; that there was no stateroom assigned to Miss Hubbell, the cousin of the defendant, but that Miss Hubbell was a passenger aboard the boat; that the chart is in the handwriting of the purser of the boat and he recognizes the handwriting. Whereupon said chart was admitted in evidence and marked plaintiff's exhibit #2.

Whereupon M. F. Schwartz cross-examined Mr. Maxwell, whose testimony was, "That they had no way of telling who had occupied Room 124 and/or Room 126. That the rooms were not connected; that the chart of the boat showed a Miss Hubbell to have been a passenger on the day in question; that on occasions when a party of persons engaged more than one room there was no way of telling that they slept in the room to which they had been assigned."

Whereupon **Mrs. Christianson** was sworn and testified as follows in behalf of the plaintiff: That she met Mrs. Fleming in 1932 after plaintiff's husband left the plaintiff and that she became interested in the plaintiff because of
21 her circumstances and she employed the plaintiff to do certain work for her. That she knew plaintiff's husband after he had been pointed out to her; that she had an automobile and offered it to Mrs. Fleming so that Mrs. Fleming would have means of obtaining evidence against the defendant. That one evening in the summer of 1933 she followed the defendant and plaintiff's husband to the defendant's mother's home in Kensington and saw them park in Harry Fleming's car on a side road near Mrs. Fisk's home and saw the defendant and plaintiff's husband embrace each other. That on several occasions in the summer and fall of 1933, she followed Harry Fleming and saw him call for the defendant and go with the defendant to restaurants in Washington, D. C. and dine together and that on one or two occasions she saw them go to Scholl's Restaurant to dine. That on January 5, 1934, she and the plaintiff followed Harry Fleming from his place of employment

at Georgia Avenue and Military Road to 18th. and M Streets where he met the defendant and they then went to the defendant's apartment at 3314 Mt. Pleasant Street, and she saw defendant and plaintiff's husband go into defendant's apartment. That Plaintiff's husband stayed for about an hour or so, then left and came back an hour later and then stayed with the defendant in her apartment until late at night. That she and plaintiff left about eleven o'clock that night and that plaintiff's husband was still with the defendant in her apartment. That on January 7, 1934, she, plaintiff and plaintiff's oldest son saw the plaintiff's husband leave his place of employment about 6 o'clock in the evening at Georgia Avenue and Military Road and that they followed him to 18th. and M Streets, N. W. where the defendant was waiting for him, that defendant entered his automobile and that defendant and plaintiff's husband went to defendant's apartment at 3314 Mt. Pleasant Street. That defendant and plaintiff's husband entered defendant's apartment and remained there for several hours that night. That the following conversation took place between defendant and plaintiff's husband in the defendant's apartment which this witness heard by listening at the door: "Defendant said to plaintiff's husband that the bill for the Reader's Digest and Hecht's had to be paid and plaintiff's husband replied that he had to send his wife six dollars, whereupon defendant replied "Don't send her any money because these bills have to be paid first." Later on the

22 same night plaintiff's husband said to the defendant "Remove your girdle and you'll be able to do it better." That this witness heard the plaintiff's husband and defendant kiss. That this kiss took place near the door leading from defendant's apartment into the hall. That immediately thereafter defendant and plaintiff's husband opened the door from the apartment to the hall and discovered this witness, plaintiff and plaintiff's son standing at the door. That an argument ensued. That plaintiff's son struck plaintiff's husband and the defendant struck plaintiff's son; that defendant while wiping the plaintiff's husband's face with her handkerchief said "Oh you've hurt my poor Harry." That the defendant said to plaintiff's husband "that plaintiff was no longer his wife and that his wife had no right to follow him." That plaintiff's husband then ran out of the building into the street and the defen-

dant ran after him and tried to restrain him from leaving her.

Whereupon M. F. Schwartz cross-examined Mrs. Christianson whose testimony on cross-examination was, "that she is now living with Mrs. Fleming and is not living in Boston; that when the defendant and plaintiff's husband went to defendant's apartment that they sauntered around the hall arm in arm; that it was a very small hall; that when the girdle was mentioned by Mr. Fleming she assumed he was trying to show her some form of exercise or trick and told her that if she took the girdle off she could do it better; that she, Mrs. Christianson is separated from her husband.

Whereupon **Mrs. High** was sworn and testified as follows for the plaintiff: That she has known Mr. and Mrs. Fleming for many years and that on June 24, 1935, she accompanied the plaintiff to the pier of the Norfolk-Washington Steamboat Company and on that morning saw Mr. Fleming and Miss Fisk coming off of the boat which had arrived from Norfolk; that she heard plaintiff say to defendant "now that you've broken up my home, you must be happy" and that defendant replied to plaintiff "yes, I am the happiest woman in the world." That plaintiff said to her husband "If you had given me my money on Saturday, I wouldn't have been here this morning," whereupon defendant said to plaintiff's husband "If money is all she wants, for land's sakes give it to her and get rid of her."

23 That this witness went to stateroom 124 and 126 with the plaintiff on board the boat from which defendant and Harry Fleming had alighted, and found a towel and tissue paper with lip stick marks on them in stateroom 124, and that the berths in stateroom 124 looked as if they had been occupied; that only one berth in stateroom 126 had been occupied. That this witness had known Mr. and Mrs. Fleming for many years and that they used to visit at each other's homes on many occasions. That plaintiff and her husband always appeared to be very fond of each other and that they got along splendidly until just about a year before the plaintiff and her husband separated. That when plaintiff and her husband separated, the plaintiff was in very destitute circumstances and that this witness supplied the plaintiff with a home, coal and food for plaintiff and plaintiff's children for a long period of time.

Whereupon M. F. Schwartz cross-examined Mrs. High whose testimony on cross-examination was, "that she did not know who occupied Room 124 or who occupied Room 126 on the boat; that two people had apparently used Room 124 and that was where the lipstick was found; that she saw Miss Hubbell get off the boat with defendant and Mr. Fleming."

Whereupon **Mrs. Griffin** was sworn and testified as follows on behalf of the plaintiff; That she resided at 418 Whittier Street, N. W. and that a home was being built at 416 Whittier Street, N. W. That on one occasion about a month ago, a man whom she later learned was Harry Fleming stand in front of the house with papers in his hand. That a short while after the house had been completed, she saw Harry Fleming visit at the home on one evening.

Thereupon she was cross-examined by Milford F. Schwartz and her testimony on cross-examination was, "that she never knew either Miss Fisk or Mr. Fleming up until the time of the trial.

Next appeared **Mrs. Charles Sanger** and after being sworn, testified in behalf of the plaintiff as follows: That she has known Mr. and Mrs. Fleming for many years and that she has known the defendant and her family for many years; that she lives in Kensington, Maryland and resided there in the year 1923, close to the home of the Fisk's, that

24 in 1923 she saw the defendant in the car of the plaintiff's husband one morning and that the defendant was sitting close to the plaintiff's husband and the father of the defendant was in the rear seat of the car of Harry Fleming. That on the 4th of July, 1933, while she was on her way home in the evening and while passing the house of the defendant, she saw and recognized the car of the plaintiff's husband parked at the home of Mrs. Fisk. That in the year of 1924 while she was at the home of the plaintiff, a telephone call came to the plaintiff and plaintiff answered the phone.

The following question was propounded to this witness by Mr. William A. Bachrach, counsel for plaintiff:

Q. "To whom was Mrs. Fleming speaking?"

A. "To Miss Marion Fisk."

Q. "How do you know?"

A. "Because plaintiff addressed her as Marion Fisk."

Thereupon Milford F. Schwartz, counsel for defendant

moved the court to strike that testimony from the record on the ground that it was hearsay and too remote, which the court did over objection of counsel for plaintiff, to which the plaintiff noted an exception.

Whereupon Milford F. Schwartz cross-examined Mrs. Sanger whose testimony on cross-examination was, "that the things that she testified took place twelve years ago and she has not seen the two together since."

Next appeared **Mrs. Hardee** as a witness for the plaintiff and after being sworn, testified as follows: That she lived in Kensington, Maryland, in 1922, close to the home of Mrs. Fleming; that in the summer of 1922, the defendant visited the home of the plaintiff on numerous occasions against the will of the plaintiff. That during these visits, plaintiff's husband would go out into the yard of his home where he was building something, and that the defendant would go out and stay with the plaintiff's husband while he was doing the building in the yard. That on several occasions in the morning, she saw plaintiff's husband and defendant leave the plaintiff's house in the car of the plaintiff's husband and that they would drive off together and that she never saw anyone else in the car other than defendant and plaintiff's husband.

25 Whereupon Milford F. Schwartz cross-examined Mrs. Hardee whose testimony on cross-examination was, "that she may have seen other persons in the car with defendant and plaintiff's husband."

At the conclusion of the foregoing testimony, Milford F. Schwartz moved the Court to direct a verdict for the defendant which motion was denied after considerable argument by counsel for defendant and plaintiff.

Whereupon in behalf of the defendant appeared **Mrs. Janet C. Atkinson**, who after being sworn, testified that the defendant had a good reputation in the community of Kensington, and that she had known defendant for eighteen years.

Whereupon she was cross-examined by Harry H. Bettelman of counsel for plaintiff and she testified that she had seen the defendant and the plaintiff's husband together on one or two occasions riding in plaintiff's husband's automobile, and had seen other people with them.

Next appeared **Miss Elizabeth Dickson** for the defendant who after being sworn testified that she met plaintiff's hus-

band in 1932. That she had about 6 or 8 dates with him from 1932 to the present time.

On cross-examination by William A. Bachrach she testified that she met plaintiff's husband at the home of the defendant in 1932 and that she and the defendant and plaintiff's husband had gone riding together on occasions in the car of the plaintiff's husband; that in the last six months she saw plaintiff's husband on two or three occasions at the home of the defendant.

Next appeared **Harry Fleming**, plaintiff's husband, for the defendant and after being sworn testified as follows: That he denied going with Miss Fisk in 1921 up to 1932. That in 1923 the youngest child was born. That he lost all affection for his wife at that time; that at no time in 1921 did he seek the attentions of the defendant. That his wife never accused him while they lived in Kensington of seeking the company of the defendant. That when they moved from Kensington to Silver Springs in 1924 he never saw Miss Fisk then nor after that up until 1932. That he only saw members of defendant's family several years later when they wanted to purchase a car. That from 1923 to

1932 he and his wife had numerous arguments and
26 that his wife not only accused him of going with Miss Fisk but with women in general. He denied ever having received any gifts or letters from the defendant; that from 1924 he had no affections for his wife. And that the last time he had sexual intercourse with plaintiff was about two or three years before they separated in 1932. That he was with Miss Fisk on January 5, and January 7, 1935, but that he was at defendant's apartment on January 7, 1935 for the purpose of selling a car to some member of her family. And he further denied any conversation on January 7th, concerning the "girdle" and concerning the paying of money to his wife, and further denied that the defendant told him to get rid of his wife. He denied that the defendant was in his stateroom the night of June 23rd and the morning of June 24, 1935 on the boat trip from Norfolk to Washington. He also denied that the defendant told him that if money was all that his wife wanted, to give it to her and get rid of her, this conversation on the morning of June 24, 1935 at or near the pier of the Norfolk and Washington Steamboat Company; that he made reservations for a stateroom for himself and Miss Fisk and her

cousin, Miss Hubbell who went on the trip with defendant and witness; that Miss Fisk and Miss Hubbell paid for their own tickets; that at no time was witness in Miss Fisk's stateroom nor was she in his. That the staterooms were next to each other but there was no door between; Miss Fisk and Miss Hubbell were together during the whole trip and at no time were Miss Fisk and Mr. Fleming alone; that they arrived in Norfolk on a Saturday morning; that the witness, Fleming, drove Miss Fisk and Miss Hubbell to the Hygeia Cottage in Virginia Beach and that the witness, Harry Fleming, immediately left alone, for his home in North Carolina; that the witness returned to Virginia Beach the following day which was a Sunday, at 4:00 in the afternoon and took Miss Fisk and Miss Hubbell to the Washington boat at Norfolk. That Harry Fleming bought Miss Hubbell's ticket for the return trip; that on the return trip the staterooms were adjoining but not connected; that Miss Fisk and Miss Hubbell took the stateroom that they wanted of the two bought, and occupied it and that the witness, Harry Fleming, occupied the other; that at no time on the return trip was he alone with Miss Fisk nor did he stay in the room with her; that he had decided as early as

1924 that he had made a bad bargain but that he had
27 stayed on with his wife on account of their children; that he had been hit by milk bottles and had had dish water thrown on him; that he had visited the home of the defendant many times when the defendant was not there. That he had been a friend of the defendant's deceased father and that he had, on many occasions, gone out with the brothers of the defendant with whom he had been friendly".

Whereupon Harry Fleming was cross-examined by Harry H. Bettelman of counsel for defendant and testified as follows: That he started to lose his affection for his wife in 1924 and that as the years past on he gradually lost it completely. That he used to visit the home of the Fisks because Mr. Fisk was a great friend of his. That he purchased the boat tickets on June 21, 1935 for Miss Fisk and himself and paid for these tickets from Washington to Norfolk and took his car along; that Miss Fisk later paid for her ticket; that he drove Miss Fisk and Miss Hubbell (the defendant's cousin) from Norfolk to Virginia Beach and left them there. That he left for North Carolina and re-

turned the next day to Virginia Beach to call for Miss Fisk and her cousin and drove them to the boat at Norfolk and then came back on the same boat to Washington.

Next appeared for the defendant, **Miss Margarie Hubbell**, cousin of the defendant who after being sworn testified as follows: That she accompanied Mr. Fleming and Miss Fisk on June 21, 1935 on board boat from Washington to Norfolk. That Mr. Fleming drove them from Norfolk to Virginia Beach and then left them saying that he was going further down in Virginia. That he returned the next day and brought them back from Virginia Beach to Norfolk for their return to Washington. That Mr. Fleming bought a ticket for her return on board boat, for which she had already paid him. That she did not purchase a stateroom going back to Washington but that she stayed with Miss Fisk in room 126. That she didn't hear much of the conversation between plaintiff, defendant and plaintiff's husband at the pier upon their arrival in Washington.

Whereupon she was cross-examined by William A. Bachrach of counsel for plaintiff and she testified as follows:

28 That she slept in the upper berth in stateroom 126 on the return to Washington, and did not leave the company of Miss Fisk the entire evening. That she had a stateroom from Washington to Norfolk, but on the return trip occupied room with Miss Fisk. That she met Mr. Fleming in the winter of 1932 at the home of the Fisks in Kensington, Maryland, and that since then she has seen Mr. Fleming and defendant together on about five or six occasions. That she did not at any time enter Mr. Fleming's stateroom nor remain alone with him. That she was with Miss Fisk during the entire trip and that at no time was Miss Fisk away from her or out of her sight; that she knew that Miss Fisk had not left the stateroom all night because it was so hot that she, Miss Hubbell, had not rested well.

The next witness for the defendant was **Willis Fisk**, the brother of defendant who was sworn and testified as follows: That he was the brother of defendant and lived in Kensington, Maryland, with his mother and defendant (sister) and family. That Harry Fleming occasionally took defendant and defendant's family to work mornings in car of plaintiff's husband. That on December 26, 1932, plaintiff called and asked if her husband was attending the funeral of the father of the witness.

Whereupon he was cross-examined by Harry H. Bettelman of counsel for plaintiff and his testimony was the same.

The next witness appearing for the defendant was **Mrs. Fisk**, defendant's mother, who after being sworn testified as follows: That she was the mother of the defendant, that in 1921 they lived in Kensington, Maryland; and that she never asked the children of the plaintiff to leave the plaintiff's husband and her daughter (defendant) alone in the living-room in 1923. That in 1922 she went to Bermuda and before leaving she requested the defendant to stay with the Flemings. That after the Flemings moved from her home in 1921 the Flemings visited them on only one occasion, and that she didn't see the Flemings for five or six years afterwards. That then she saw Mr. Fleming about the purchase of a radio. That she didn't see him for a long time thereafter until the death of Mr. Fisk, on December 26, 1932. That from 1932 on she didn't see him until this present year. That this year she asked Mr. Fleming to look out for the building of the house on Whittier Street, N. W. in Washington. That she saw Mr. Fleming
29 about one year ago for the first time since the death of her husband.

Whereupon she was cross-examined by Harry H. Bettelman and testified as follows: That after the Flemings left Kensington which was in 1923, the plaintiff continuously telephoned the Fisk home throughout the ensuing years. That defendant lived in Washington for a few months for several winters prior to 1929 and lived at an apartment. That defendant never had any apartments other than the one on Mt. Pleasant Street, and that she used to visit defendant occasionally but did not live with her at the apartment. That defendant went to college in Ohio in 1924. That only on one occasion did she see plaintiff's husband leave the house with defendant.

The next witness appearing for the defense was the defendant **Marion Fisk** who after being sworn testified as follows: That she doesn't remember the incident in the parlor in 1923 in her mother's home in Kensington; That in 1923 she visited the plaintiff with her father and mother while plaintiff was confined to hospital. That she has lived in Washington during the past three or four winters, and that while she lived in the Mt. Pleasant Street apartment her mother lived with her, but that she did visit at times

and was not there all the time. That when Mr. Fleming drove her to work in the mornings members of her family went along. That she never called Mr. Fleming on the phone when the Flemings lived in Kensington and Silver Springs, Maryland. That she never called plaintiff's husband before last year or so. That he always called her. That she denied in general all the testimony of the plaintiff and plaintiff's witnesses and that she doesn't recall what was said at the apartment on January 7, 1934, except that Mrs. Christianson did most of the talking.

Whereupon she was cross-examined by William A. Bachrach of counsel for the plaintiff and testified that she had the apartment on Mt. Pleasant Street, in 1933-1934. That she may have had conversation on January 7, 1934 with plaintiff's husband about the Readers Digest, that she went to movies with plaintiff's husband several times within the last year or so. That she remembers the conversation of June 24, 1935 with the plaintiff at the pier of the Norfolk and Washington Steamboat Company.

Whereupon the defendant concluded her case, and
30 the jury was excused, whereupon defendant, by her counsel Milford F. Schwartz, moved for a directed verdict as follows:

Mr. Milford F. Schwartz, "If your Honor pleases I move the Court for a directed verdict in favor of the defendant."

After argument by counsel for the defendant and argument by counsel for the plaintiff the following occurred:

The Court: "I shall direct a verdict for the defendant."

Mr. Harry H. Bettelman: "May it please the Court, I note an exception to your Honors ruling in granting the motion of the defendant."

The Court: "Exception granted."

Whereupon the Court instructed the jury to render a verdict for the defendant.

Whereupon the jury rendered its verdict for the defendant.

Whereupon Harry H. Bettelman of counsel for plaintiff noted an exception to the Court's ruling directing a verdict in favor of defendant.

The Court: "Exception granted."

And thereupon, and as all of said exceptions were duly ordered and allowed as aforesaid, and duly entered upon the minutes of the Court, before the entry of the finding,

and because the matters and things hereinbefore recited are not matters of record, in order to make the same part of the record herein, it is hereby ordered so that the plaintiff may have the case reviewed on appeal, the plaintiff by her attorneys, moves this Court to sign and seal this, her Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the Court; and thereupon the plaintiff tenders this, her Bill of Exceptions, and requests the Court to sign and seal the same, which is accordingly done, now for then, this 11th day of March, 1936.

JOSEPH W. COX,
Justice.

31 Service of copy of Bill of Exceptions acknowledged
this 11th day of March, 1936 and I hereby consent to
same.

MILFORD F. SCHWARTZ,
Attorney for Defendant.

Agreed to and settled this 11th day of March, 1936.

WM. A. BACHRACH,
HARRY H. BETTELMAN,
Attorneys for Plaintiff.

MILFORD F. SCHWARTZ,
Attorney for Defendant.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED NOV 12 1936

Monroe Burke

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 6668.

RUTH FLEMING, *Appellant*,

v.

MARION FISK, *Appellee*.

BRIEF FOR APPELLEE.

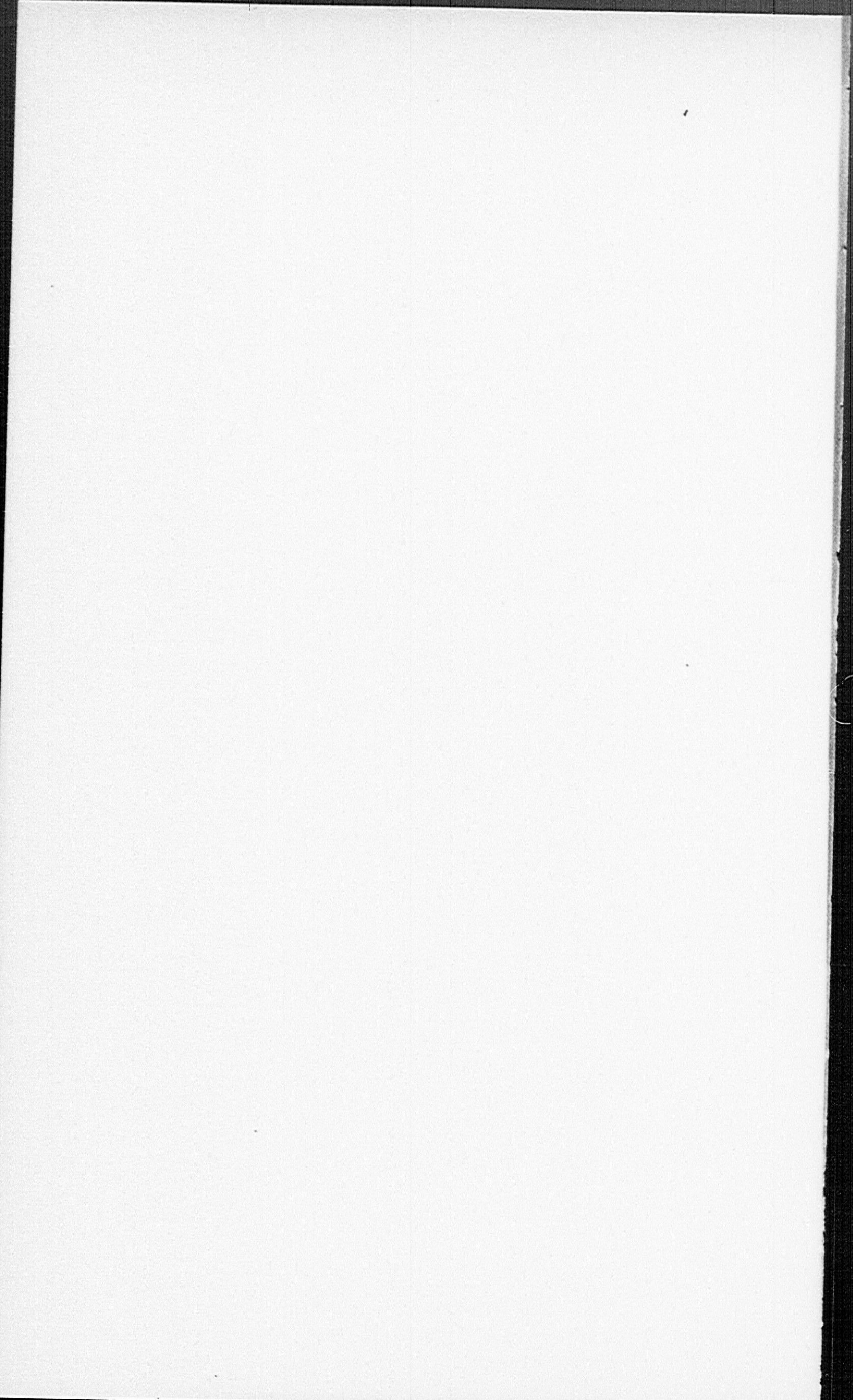
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Attorneys for Appellee.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 6668.

RUTH FLEMING, *Appellant*,

v.

MARION FISK, *Appellee*.

BRIEF FOR APPELLEE.

Statement of Facts.

It is believed that a statement of facts in their chronological sequence would be conducive to a clearer understanding of the acts and conduct charged to the defendant and whether in law plaintiff sustained the allegations contained in her Declaration.

Appellant is "plaintiff" below and appellee, "defendant", and they will be so denominated herein.

Plaintiff was married to Harry Fleming in 1916. In 1921 the Flemings moved to Kensington, Maryland, and for two or three months lived there with defendant's family, thereafter moving to their own home in

Kensington. At this time, and often accompanied by defendant's father or another member of the family, and with the knowledge of plaintiff, (Rec. p. 15) plaintiff's husband drove defendant to her work, in Washington, D. C. In 1922 defendant gave plaintiff's husband a picture of herself and in the same year visited plaintiff's home and would sit out in the yard while plaintiff's husband was working. In 1923 plaintiff's husband and defendant visited plaintiff at the hospital and, in the same year, plaintiff's husband and defendant were sitting in the parlor of defendant's home. In 1924 defendant, then a student at college, wrote a letter to plaintiff's husband which he showed to his wife and to which he replied that he was happy without the defendant, wished to be left alone and advised defendant to interest herself in other men. No other specific act is charged to the defendant during these years. The record is unblemished by any acts attributable to the defendant for the years 1925, 1926, 1927, 1928, 1929, 1930, 1931 and 1932, except for a statement of plaintiff's infant son that in 1930 defendant telephoned his father. In April of 1932 plaintiff and her husband became separated, and in the same year on the 3d of June, plaintiff swore to a Bill of Divorce a menso et thoro wherein, inter alia, she alleges that owing to the vicious conduct exhibited by her husband towards her and his constant efforts to do her bodily harm, she was afraid to return and live with him and that the desertion of her by her husband on the 30th day of April 1932, "is final, complete, and is beyond hope or a reasonable expectation of a reconciliation." (Rec. p. 12) Subsequent to this separation, the record charges the defendant with being in the company of the plaintiff's husband dining together in public places and

on one occasion, with sitting together in a parked automobile embracing each other; that on January 5 and 7, 1934, plaintiff's husband was at defendant's apartment and in June of 1935, plaintiff's husband took a trip to Norfolk on the same boat with defendant and a lady relative of the defendant.

It should be noted that defendant's testimony is in many respects at variance with that of the plaintiff, as will fully appear in the argument.

At the end of plaintiff's testimony, defendant moved for a directed verdict which was over-ruled but which was renewed and granted when all the evidence was in, whereupon the court directed the jury to render a verdict for the defendant, which was done and judgment accordingly entered.

From this judgment plaintiff appeals and assigns five errors (Rec. p. 5).

Assignment No. 5 deals with the court's refusal to permit a witness (Mrs. Sanger) to testify as to whether she had heard plaintiff speak to the defendant over the telephone. The pertinent part of the record upon which this assignment of error is based, is at page 21 and shows that in 1924 while witness was at the home of plaintiff a telephone call came and plaintiff answered it. The following question was propounded to this witness by counsel for plaintiff:

Q. "To whom was Mrs. Fleming speaking?"

A. "To Miss Marion Fisk."

Q. "How do you know?"

A. "Because plaintiff addressed her as Marion Fisk."

Counsel for defendant moved the court to strike that testimony from the record on the ground that it was

hearsay and too remote, which the court did. Clearly this was hearsay evidence and the court was correct in striking it from the record. Plaintiff's counsel makes no attempt to substantiate this assignment of error, does not refer to it in his brief other than to enumerate it as one of the assignments of error on page 4, and may be considered to have abandoned it. The point is too elementary for citation of authorities.

Assignments of error Nos. 1, 2, 3 and 4 relate to the action of the trial court in directing a verdict for the defendant at the conclusion of the taking of the testimony and may therefore be considered together and they are so considered in plaintiff's brief.

The Question Involved.

The sole question is whether the evidence adduced at the trial was sufficient to send the case to the jury.

Argument.

In support of her contention that the evidence was sufficient, plaintiff cites and discusses a number of cases and by analogy seeks to prove to the satisfaction of this court that the evidence in the cases cited by plaintiff was no stronger than that appearing in her own case and that the court in the cases cited either submitted the case to the jury or else a verdict was directed, which on appeal was reversed. It is necessary therefore for defendant to go somewhat in detail into the facts of the cases cited by plaintiff and to compare and contrast with plaintiff's case.

Plaintiff charges in her declaration (Rec. pp. 1, 2 and 3) that defendant wrongfully, maliciously, unlaw-

fully, wickedly and intentionally contriving and intending to injure the plaintiff and deprive her of the affection and consortium of her husband, enticed him from the society and company of the plaintiff, and further that defendant induced plaintiff's husband to leave plaintiff and cause plaintiff and her husband to become separated. What are the grievances chargeable to the defendant upon which a cautious and reasonable mind can base a conclusion that the defendant herein wrongfully, maliciously, unlawfully, wickedly and intentionally contrived to injure the plaintiff, to deprive her of the affections and consortium of her husband and to cause them to become separated? Plaintiff in her declaration alleges that she was married in 1916 and that her husband had been a dutiful husband up to 1932 when they separated. (Rec. p. 7) If she was aware of the acts charged to the defendant and allegedly committed over a period of twelve years, beginning with 1921 and culminating in the separation in 1932, plaintiff admittedly was not unruffled by such acts nor was her marital happiness in the least disturbed for she, herself, declares that she and her husband lived happily from the time they were married up to the time of their separation. Such acts, even if they were allowed to go unchallenged, which is not the case, do not in themselves create in a reasonable mind the inevitable judgment that defendant was the active, controlling and procuring cause of the loss by plaintiff of her husband's affections. They are few in number and inconsequential in content. Let us look at them. In 1921, while plaintiff and her husband were living with the defendant's family, plaintiff's husband, often accompanied by defendant's father or other members of

the family and with the knowledge of the plaintiff (Rec. p. 15), drove defendant to her work in Washington. It cannot be reasonably alleged that under the circumstances the defendant's conduct in riding in the same automobile with plaintiff's husband and in company with her father can be construed as an act of aggression calculated to entice plaintiff's husband away from her and to alienate his affections. Neither can one from the bare facts surrounding this acceptance of a gentlemanly offer, fairly and logically deduce an improper motive. The two families were living together in the same house, and it is not stretching the rules of etiquette to the breaking point by saying that it was common courtesy to invite the defendant to ride to Washington in the same automobile in which plaintiff's husband drove to Washington, especially since the father of the defendant or other members of the family invariably accompanied them. Plaintiff admits she knew that defendant's father was going to work with them, as well as with other members of the family or neighbors. (Rec. p. 15) No other act is attributed to the defendant for the year 1921. In 1922 it is contended that defendant gave plaintiff's husband a picture of herself, and on occasion would visit plaintiff's home and sit out in the yard while plaintiff's husband was working. On cross-examination plaintiff testified that she did not have the picture in question (Rec. p. 15) and the picture is not in evidence, and plaintiff's husband denied ever receiving any gifts from the defendant (Rec. p. 23) and defendant denied ever giving any gifts to plaintiff's husband. (Rec. p. 27) But if it be conceded, for the sake of argument, that a picture did pass from the defendant to plaintiff's husband, a logical mind has a right to question whether

such an act occurring twelve years prior to the separation was calculated to alienate and did alienate the affections of defendant's husband. Neither can the average rational mind accept without serious questioning the contention that an innocent visit by defendant to plaintiff's home twelve years prior to the separation, such visit happening while plaintiff herself was in the house, even assuming that defendant sat out in the yard where plaintiff's husband was working, is such an act as is calculated to alienate and did alienate the affections of plaintiff's husband. These are the only grievances complained of for the year 1922. In 1923, while plaintiff was confined to a hospital, her husband paid her a visit and with him at the time was the defendant. Not an unusual or unnatural thing for a close friend of the family to visit the plaintiff at the hospital in company with plaintiff's husband, although defendant says she made the visit with her father and mother. (Rec. p. 26) And in the same year the defendant is alleged to have sat on one occasion with plaintiff's husband in the parlor of defendant's home. In 1924, while defendant was a student at college, she allegedly wrote a letter to plaintiff. Defendant denies writing this letter (Rec. p. 27) and Fleming denies receiving it. (Rec. p. 23) But assuming this to be true for the sake of argument, the Record clearly indicates in plaintiff's own testimony (p. 8) that her husband showed plaintiff this letter and after a conference between them a reply was prepared by the husband addressed to defendant wherein the husband informed the defendant that he was happy without her, that he wished to be left alone and that he advised defendant to interest herself in other men. If from the meager testimony thus far recited

a rational mind could by any conceivable justification draw the inference that these acts constituted an active and aggressive course of conduct, such as was calculated to alienate and did alienate the affections of the husband, that same mind must necessarily arrive at the conclusion that any such tendency, if it ever had an inception, was completely negatived, uprooted and annihilated by the appalling barrenness of the record for the years 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932 and 1933, when in 1933 the defendant is again drawn into the Fleming circle. Harry Fleming, as he had requested and so far as the defendant was concerned, was for these many years left severely alone. Miss Fisk never even thought of disturbing his peace of mind by sending him an answer. Neither is she charged with any other act or conduct in any way related to Harry Fleming. Surely such paucity of the record for the years 1924 to 1932, inclusive, when plaintiff filed suit for divorce against her husband and alleged that the desertion of her by him on the 30th of April, 1932, was final, complete and beyond hope or a reasonable expectation of reconciliation (Rec. p. 12), is sufficient proof that if there was any affection between the two of them and it was lost, most certainly the defendant was not the active, compelling, decisive or procuring cause of such loss. A perusal of the Record (p. 12 and 13), being plaintiff's Bill for Divorce, particularly paragraphs on said pages numbered 5, 6, 7, 8, 9 and 10, will more eloquently indicate in the plaintiff's own words that there was not any affection left between her husband and herself, and Marion Fisk had nothing to do with the acts detailed in plaintiff's Bill for Divorce which lead up to the separation of April 30th, which separation admittedly "is final, com-

plete and is beyond hope or a reasonable expectation of a reconciliation.”

It should be noted that plaintiff does not, in said Bill for Divorce, charge the defendant with being responsible for the derelictions of her husband, therein enumerated.

Plaintiff cites the case of *Modisset v. McPike* (74 Mo. 636) and draws therefrom a proposition of law as to the kind of evidence requisite to maintain a cause of action for the alienation of affections:

“if the jury believe from the evidence in the cause that the defendant was intentionally guilty of such conduct as was calculated to prejudice plaintiff’s wife against him, and to alienate her from him and to induce her to leave him, to remain apart from him, * * * and that such effect was intended by the plaintiff to be produced, and was actually produced by his conduct, then the jury should find a verdict for the plaintiff.”

And further, that the facts constituting the cause of action may be proven by circumstantial evidence.

Defendant finds no fault with this statement of the law but merely asks the question whether there was in the case at bar evidence either direct or circumstantial which warranted a submission of the case to the jury. The case cited was in fact submitted to the jury, which returned a verdict for the defendant. Briefly, the facts were these: Plaintiff and his wife were married in 1855 and lived happily together until a short time prior to their separation, which occurred in the winter of 1872-73. In 1876 the wife obtained a divorce. Prior to the separation the relations of the plaintiff and the defendant were friendly. After the separation plaintiff’s wife lived in a house belonging to defendant. Defen-

dant, who apparently was attached to the staff of the Court House, often went to the house and during sessions of the Court, stayed at the house with plaintiff's wife. Such conduct on the part of the defendant was not held sufficient to cause the alienation of the affections of plaintiff's wife.

The case of *Reading v. Gazzam* (200 Pa. 70; 49 Atl. 889) is quoted in support of the proposition that where there is testimony which would create an inference of unlawful acts in the minds of reasonable men, the acts from which inferences may be drawn and the testimony relating thereto should be submitted to the jury. At page 6 of plaintiff's brief a summary appears purporting to represent the opinion of the court. In order to give a more inclusive and exact statement of the court, we quote below from pages 889 to 890 (49 Atl. 889):

“The following extracts from some of the defendant's letters to the husband of plaintiff, written during the period of her alleged enticement of him, can hardly be regarded as legitimate portions of strictly business communications, but even ‘from a fifth cousin once removed’ rather impress the impartial mind as *wooing words* from one woman to the husband of another; and the court would have erred if it had said to the jury that they were not, *in connection with all the other evidence in the case*, to be fairly regarded as proofs of the allegation that the defendant intended to entice the husband from his wife.” (Italics ours.)

A careful reading of the opinion quoted above clearly reveals the nature of the letters. There are at least six of them quoted in the opinion; the court says it is quoting from only some of the letters written by defendant to plaintiff's husband, and their full import can

be appreciated only by a reading of them. They are apparently written by a highly cultured person, very tactfully written, and yet the court was able to discern portions in them which "can hardly be regarded as legitimate portions of strictly business communications." But the letters alone were not in themselves sufficient to send the case to the jury. As the court clearly states, it was in connection with all the other evidence in the case that such letters could be fairly regarded as proofs of the allegations that the defendant intended to entice the husband from his wife. Now, what is the other evidence referred to by the court? In addition to the letters, one witness testified that he saw plaintiff's husband and defendant in a hotel "sitting on a very small lounge, and he had his arm around her, and she was leaning on him." Not so serious in itself, but others relate that the two "spent months at a resort at Cornwall-on-the-Hudson; how he was constantly in her bedroom; that they were driving together, and strolled alone at night through the dark lawn until late hours, at times not returning to the hotel until twelve or one o'clock." Here we have a series of wooing letters from the defendant to the plaintiff's husband; testimony that the two were seen in hotels, that they spent months at a resort, that he was constantly in her bedroom, and yet even way back in 1901 when one might venture the suggestion that society expected more reserve of a woman, three judges dissented, not thinking that such conduct was sufficient to send the case to the jury. No such record appears in the case at bar. Only one letter is mentioned and that was quickly and effectively disposed of, and was not put in the record for the perusal of this Court. No months at a resort, no rendezvous in defendant's bedroom, no series of

positive and well calculated acts intended to alienate the husband's affections but, on the contrary, only some evidence that in the years 1921, 1922, 1923 and 1924 defendant and plaintiff's husband occasionally saw each other, and a complete absence of defendant from plaintiff's husband's horizon for the ensuing nine years and until after plaintiff and her husband had become separated finally, completely and irreconcilably and she had filed a bill for divorce. Assuming that the proposition of law is correctly stated that where there is testimony which would create an inference in the minds of reasonable men that such acts were the controlling cause of the alienation of affections the case is for the jury, it is defendant's contention that no such acts appear in the record that would warrant the minds of reasonable men to draw the conclusion that the defendant was the controlling cause of the alienation from plaintiff of her husband's affections.

The case of *Rush v. Buckles* (117 S. E. 131), decided in 1923 by the Supreme Court of West Virginia, presents a situation where the defendant had regularly visited plaintiff's wife while she was away from her husband and living in a hotel and later accompanied her to Nevada where she had gone to obtain a divorce. There was sufficient evidence of continuous and aggressive conduct on the part of the defendant which justified the submission of this case to the jury. Plaintiff at bar in her brief on page 6 concludes what is intended as a quotation from the opinion that "this case should have been submitted to the jury for it to determine whether these acts constituted acts of aggression." The language here quoted is not found in 117 S. E. 131, and the case was in fact, submitted to the jury who

found for the defendant. The court set aside the verdict and on appeal the verdict was reinstated. Plaintiff asks us to note that the evidence in the case of *Rush v. Buckles* was considerably weaker than that produced in the case at bar. We are reluctant to concede such an assertion. The defendant in that case persistently, continuously and designedly followed an aggressive course of conduct definitely calculated to alienate and which did alienate the affections of the wife, and when that was done, journeyed with her to Nevada where she obtained a divorce. And yet, the jury found for the defendant. None of the acts attributable to the defendant contain that element of incisive aggressiveness appearing in the case cited.

Plaintiff argues that the court should have permitted the jury to pass upon the case and in support of his contention cites *Porter v. Heishman* (154 N. W. 503), *Bradstreet v. Wallace* (150 N. E. 405), *McGuffie v. Hooper* (122 Me. 119, At. 111). Plaintiff quotes at length from *Porter v. Heishman* (plaintiff's brief, pages 7, 8 and 9). A casual reading of the quotation will warrant the conclusion that the facts therein narrated are by far stronger than those adduced at the trial in the case at bar, that even an attempt at comparing the two cases should not be made. After quoting at length from the opinion counsel for plaintiff says that "motion by defendant for directed verdict at close of defendant's case over-ruled on the above testimony." It should be noted that strong as the facts are in the language quoted from the opinion in the above case, the court said that this was only a *part* of the record and enough had been recited to show that the testimony was ample to support a verdict.

Plaintiff devotes 2½ lines to the case of *Bradstreet v. Wallace*, (Supreme Judicial Court of Mass., 1926) as follows: "Evidence that the husband absented himself from home during which time he consorted with the defendant is sufficient to take the case to the jury." The following excerpt from the opinion in that case will give a more inclusive picture of the nature of the evidence appearing in that case, "We think there was evidence that the husband of the plaintiff absented himself from his home and that of the plaintiff for substantial periods of time; that during such periods he consorted with the defendant upon terms of the utmost intimacy and familiarity; and that his conduct and that of the defendant had a legitimate tendency to prove adulterous inclination although insufficient in fact to establish criminal conversation. The evidence, in the light of all the circumstances, also would be sufficient for the jury to find that the employment of the husband by the defendant during the year 1921 was for the purpose of concealing the methods of enticement used by the defendant and the motives of her actions."

A condensed piece of wisdom is extracted from the case of *McGuffie v. Hooper* in the form of a maxim that "many littles make a mickle" supported by a statement of the court that the cumulative force of a long series of such acts justified the conclusion which the jury drew. At most we have the judgment of the court which reviewed the evidence that there was in that case a long series of acts from which the court could infer a cumulative effect sufficient to justify the finding of the jury, but what that long series of acts consists of we are not told, neither are those acts set forth in the opinion. A comparison between two things, one of which is not known, is impossible, but we may well rely

on the judgment of the court in that case that that long series of acts was of such a nature as to warrant the cumulative effect attributed to the acts.

The case of *Stillwell v. Stillwell* (172 N. W. 177, 186 Ia. 177) is cited by plaintiff under a declaration of law that it is almost impossible to establish a case by direct and positive evidence. Briefly this was a suit by plaintiff against the parents of her husband for the alienation of his affections. When the couple were married the husband was about twenty years old and plaintiff considerably younger. The parents pursued a course of conduct which no reasonable mind could question as tending to and eventually bringing about the alienation of their son's affections from his wife and that that was the result contemplated by the parents. Among other acts, the parents charged the plaintiff with spurious paternity of her new-born child, circulated rumors that she had been intimate with another man and often asserted that there was no use for the couple to live together for the result would be either murder or suicide. Only a reading of the opinion in that case can give a complete picture depicting a deplorable situation and a course of conduct on the part of the parents of the husband which can not be otherwise described than as inhuman. Certainly this was a question for the jury and the jury did find for the plaintiff, but we respectfully contend that the two cases are far apart.

The case of *Van Hemelen v. Eads* (244 S. W. 942), decided in 1922 by the Kansas City Court of Appeals of Missouri, is cited by plaintiff as one in which the Appellate Court ruled that it was error for the trial court to over-rule defendant's demurrer to the evidence, such evidence consisting of a series of letters. The court itself, however, very clearly indicates the

substantial character of the evidence when it states that "the letters of defendant to plaintiff's wife and her letters to him so clearly show the successful efforts of defendant to alienate the affections of plaintiff's wife and to wean away her love for plaintiff." Defendant admitted writing the letters and the sincerity of his purpose which was to win for himself the affections of plaintiff's wife. He refers to her in his letters as his "soul-mate" and that being in her company was a "bit of heaven" and expresses regret that plaintiff's husband was not drafted into the Military Service so that defendant could be unmolested in the pursuit of his set purpose. "Sure too bad they couldn't get your old man (meaning in the Military Service), but you don't need to be tied to him unless you want to, this is a free country, at least as far as that goes."

The opinion in the principal case cited quotes from *Surbeck v. Surbeck* (208 S. W. 645) as follows, clearly showing that there was in the opinion of the court substantial evidence requiring submission of the case to the jury:

"and if there is any substantial evidence, whether direct or inferential, tending to establish the ultimate facts constituting the various necessary elements of plaintiff's cause of action, then we can not over-turn the verdict upon the grounds that it is without evidentiary support."

This case cited by the Kansas City Court of Appeals of Missouri, in the court's opinion in the case of *Van Hemelen v. Eads*, presents a situation wherein defendants are the plaintiff's husband's mother and elder brother and the two consistently, deliberately and maliciously agitated and maintained a course of conduct towards plaintiff who was only sixteen years of age,

which conduct can be characterized in no less charitable terms than callous, unmerciful and decidedly inhuman. The court itself after pointing out that it had carefully and painstakingly gone through the record, exclaims and questions "in the face of all this record, how can we say there is no evidence that the defendants acted together and intentionally effected a separation without just cause and excuse."

We respectfully submit that the evidence, both in the case of *Van Hemelen v. Eads* and *Surbeck v. Surbeck*, is much stronger than that adduced at the trial in the case at bar. The court indicates the amount and probative force of the evidence in these two cases when it states in its opinion that it was of a substantial character and tended to establish all the elements necessary in a cause of action for the alienation of affections. The evidence in the case at bar falls far short of producing a similar result.

Plaintiff points to the case of *Weisenberg v. Hazen* decided by this court (63 App. D. C. 398), and avers that the court there said that where there is just a little more than a scintilla of evidence the case must be submitted to the jury (plaintiff's brief p. 14). The question in that case was whether the defendant was negligent in removing by endothermy a finger nail from plaintiff's finger. The court said, citing *Gunning v. Conley* (281 U. S. 90), "where uncertainty as to the evidence of negligence arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." It is respectfully submitted that the language above quoted is not equivalent to the statement made in plaintiff's brief that where there is

just a little more than a scintilla of evidence, the case must be submitted to the jury.

The case of *Dey v. Dey* (110 At. 703), decided in 1920 by the Supreme Court of New Jersey, is cited as showing that though there be a separation between husband and wife, outsiders should not unfavorably interfere. The view of the New Jersey court is in direct conflict with the opinion expressed by the New York Court of Appeals in *Servis v. Servis* (72 N. Y. 438, 65 N. E. 270). In any event, the evidence in the case at bar, so far as it bears upon the relations of defendant and plaintiff's husband after the separation, does not warrant the finding that defendant's conduct was the controlling cause of the alienation of the affections of plaintiff's husband.

The case of *Scowden v. Taphorn* (214 Ill. App. 394) is cited by plaintiff as one in which the appeals court reversed a ruling of the trial court directing a verdict for the defendant at the close of all testimony. The question was "whether the evidence offered by plaintiff, with all the reasonable inferences to be drawn therefrom, fairly tended to prove the allegations of his (plaintiff's) declaration." The facts were: Plaintiff's wife was receiving treatments from defendant, a physician, for a misplaced womb. She went to his office on a Sunday afternoon. Plaintiff had left the house with his dinner-box and said he was going to work, but instead went to defendant's office, and was there waiting in the hallway when his wife arrived. She did not see him and passed into a private room with defendant. Plaintiff listened at the door and heard his wife and defendant talking, "kissing and deep breathing and movements. He further testified that he heard plaintiff ask defendant's wife if it felt good, or words to that effect, and that she replied that it did; that he, the

plaintiff, then broke open the door and found the defendant and his wife in the room, his wife lying on the floor on the defendant's overcoat; that they were both practically undressed, with the exception of their underwear, and that the doctor was over plaintiff's wife at the time plaintiff came into the room."

Plaintiff ceased living with his wife.

No motion was made at the close of plaintiff's evidence for a directed verdict, but defendant went on and offered testimony to the effect that he was simply giving plaintiff's wife treatment and that he was not guilty of any improper relations with her.

Dodge v. Rush (28 App. D. C. 149) is cited by plaintiff in support of the legal proposition that inferential evidence may be sufficient upon which to predicate a finding of alienation of affections. The law on that point is stated in the opinion of that case as follows: "The court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this, we think, is substantially the doctrine of the adjudged cases that control in this jurisdiction." Citing *Adams v. Washington and G. R. Co.* (9 App. D. C. 26), and *Ward v. District of Columbia* (24 App. D. C. 524).

It is defendant's contention that the evidence brought out in the trial in the case at bar plainly indicates that plaintiff has not made out a case sufficient in law to entitle him to a verdict. A somewhat more detailed account of the evidence in *Dodge v. Rush* will show that the analogy between the two cases is not well taken. The testimony tended to show that plaintiff and her

husband lived happily from 1882 when they were married up to 1899 when defendant entered into the picture. Mrs. Rush lived on "S" Street. She was married but it is not known where her husband was. He was not at the "S" Street address. A servant of Mrs. Rush testified that between 1899 and 1900 Dodge called to see Mrs. Rush two or three times a week. A second servant testified that Dodge called three or four times a week and generally came about 6:00 P. M. and was in at 7:30 when witness left the house; that Mrs. Rush's bedroom connected with the parlor on the first floor and one could look into it from a backyard window; that when Dodge called and went into the parlor, Mrs. Rush always closed the doors and told the witness to talk to her through the door when she wanted anything and not to "rubber"; that on two occasions this witness peeped through the back window and on the first saw Mrs. Rush lying down on the bed "in her negligee" and that Dodge was sitting on the bed with his coat off, and on the second, both were sitting on the bed with their arms about each other. Other servants testified that the visits of Dodge to Mrs. Rush continued until June, 1904; he frequently called in the morning when defendant was ill, and would walk directly into her bedroom; Mrs. Rush instructed her servants to tell other callers she was not in when Dodge was there. In 1902 Dodge called during the day, entered the parlor, went into the bedroom, witness heard voices in the bedroom; an express messenger called to have a package re-addressed and witness called to Mrs. Rush who went to the door, opening it sufficiently to receive the package. She was in her nightgown. Later Mrs. Rush used another bedroom on the second floor. On one occasion witness saw Dodge and Mrs. Rush go up together, enter the room,

close the door and Dodge came down between 10:00 and 11:00 P. M. Witness mailed letters to Dodge from Mrs. Rush at various times. Rugs and carpets used in Dodge's home and supposed by Mrs. Dodge to have been sent off for storage were found in Mrs. Rush's home. A deputy marshal under a writ of replevin found eight (8) rugs and two (2) pieces of carpet in Mrs. Rush's home. A bronze figure formerly in Dodge's home was on the mantel of Mrs. Rush's home and Dodge's photograph was there too. The opinion of the court states that if the jury could give credit to the several witnesses they might also find from the circumstances testified to by them that the relations of the parties were illicit.

The facts in the case of *Gaudette v. Taylor* (183 At. 335) are stronger than the partial quotation on page 17 of plaintiff's brief indicates. The omitted parts from that quotation show that the letters and post cards defendant wrote to plaintiff's wife contained "ardent love messages, symbolized kisses and vows of burning affection. Not only did he write such messages to her, but she received them and replied to them or some of them in a way to enrage his wife who got hold of one and read it." Piecing together the part of the opinion quoted in plaintiff's brief and the supplemental material above quoted we see that defendant's conduct toward plaintiff's husband had gone "to say the least" beyond the bounds of propriety, that the defendant was the aggressive and persistent cause which brought about the alienation of the affections of plaintiff's husband; that Mrs. Gaudette neglected her household duties while this affair with the defendant was going on. The case at bar is devoid of any such aggressive elements on the part of the defendant, and plaintiff's hus-

hand as plaintiff herself confesses in her Bill for Divorce had miserably neglected his duties for a period of eight (8) years immediately preceding the filing of such Bill for Divorce, during which years there is not even a spark of evidence connecting the defendant with such neglect of duty.

Now, we suppress an instinctive exclamation to which we might, in another place have given vent, at plaintiff's temerity in attempting to compare the facts in the case of *Richards v. Lorleberg* (79 Fed. 2d 413), decided by this court August 19, 1935, with the facts in the case at bar. *Richards v. Lorleberg* is sufficiently recent and undoubtedly the facts are still fresh in the minds of every member of this Court to make it unnecessary for the defendant here to set forth in detail the long and uncontroverted chain of aggressive acts which fully justified this court in sustaining the lower court in allowing the case to go to the jury. The summary of facts appearing in quotation marks on page 17 of plaintiff's brief very adroitly selects only those acts of the defendant least conducive to the alienation of the affections of plaintiff's husband, and the court will readily recall that there were other more serious acts charged to the defendant. Appellant in that case, defendant below, contended that the court should have directed a verdict for the defendant at the close of the testimony. This court in sustaining the trial court said "we think, however, that the evidence introduced on behalf of the plaintiff required the court to submit the case to the jury, and moreover that the evidence furnishes a sufficient basis for the verdict returned by the jury." It is clear that the facts in the case of *Richards v. Lorleberg* were so overwhelmingly indicative of a determined, deliberate, persistent and aggressive course of conduct

on the part of the defendant calculated to alienate the affections of plaintiff's husband, that his affections were actually alienated and the defendant's conduct was the effective and controlling cause of such alienation.

The cases of *Bennett v. Smith* (21 Barb. 439), *Hoard v. Peck* (21 Barb. 441) and *Heermance v. James* (47 Barb. 120 (1866)) are cited in substantiation of the proposition that one is held to intend the natural consequences of one's act.

In *Bennett v. Smith* the plaintiff sued his wife's father for advising her to stay away from plaintiff, her husband. The court instructed the jury that the defendant is liable if he counselled his daughter to stay away from her husband, regardless of the father's motives. The daughter was between 15 to 16 years of age. The jury found for the plaintiff. A new trial was granted on the above erroneous instruction, the court holding that under the circumstances the motive of the father in thus advising his daughter should have been considered.

Moreover, evidence was excluded by the trial court which was admissible, that if a cause of action is proved, evidence showing the profligate character of the husband may be introduced to reduce damages.

Hoard v. Peck (56 Barbour 202), decided in 1865. A druggist secretly, three times a day, for nine months sold opium (laudanum) to plaintiff's wife, which being poisonous, gradually weakened her physically and mentally and eventually made her insane, and thus rendered her incapable of performing her marital responsibilities, and her affections were alienated from plaintiff. The druggist was found guilty on the ground that he conspired to do wrong.

Heermance v. James (47 Barb. 120 (1866)). Defendant counseled, advised, aided and assisted the wife of plaintiff to procure the commencement of proceedings for divorce. As a result of defendant's conduct the wife refused to recognize her husband as such, or to live with him as his wife.

Rogers v. Haines (285 Pac. 412 (1930)). The jury found for the plaintiff and a reversal is sought on the ground of insufficient evidence. The facts: Plaintiff and Mrs. Rogers were married in 1922 and admittedly lived happily together until defendant became acquainted with Mrs. Rogers in 1925 at Ione, California, where she had gone to visit her parents. After several weeks, Mrs. Rogers returned to her home at Marshfield, Oregon. Defendant accompanied her as far as Sacramento, California. Two weeks later, defendant made excuse to drive for sheep to Oregon in a new Hudson car and took with him Albert, Mrs. Rogers' brother. He went direct to Marshfield. Seeking to buy sheep was only a subterfuge. Defendant made no attempt to get sheep, and Western Oregon is not a sheep country. Defendant had never met plaintiff before. He was invited to stay at the Rogers' home and stayed ten days. Plaintiff was a mill worker and away during the day. Defendant throughout his sojourn at Marshfield was the constant companion of Mrs. Rogers and the two often went out riding together and by themselves. Plaintiff on occasion found defendant and plaintiff's wife in the bedroom, the wife wearing only a slip. Defendant advised Mrs. Rogers to get a divorce and go around the world with him. When defendant left for California, he attempted to persuade her to go with him. A few months later Mrs. Rogers went to

California and was frequently in defendant's company. She returned home but went away again. Plaintiff went after his wife and again found her in California. He attempted to persuade her to return home but without avail. The defendant continued his aggressive conduct even though he well knew the plaintiff was earnestly endeavoring to persuade his wife to return home. The court in refusing to upset the verdict of the jury said that the foregoing circumstances were "sufficient to support the implicit finding of the jury to the effect that the conduct of the defendant was the procuring cause of the separation of the spouses and of the alienation of the affections of plaintiff's wife."

It is respectfully submitted that the facts in this case are far more persuasive to sustain a cause of action for the alienation of affections than those in the case at bar.

In *Rose v. Mitchell* (43 At. 67, 21 R. I. 270) the court found that facts which appeared in evidence on the day of separation and immediately after the separation between defendant and plaintiff's spouse were of such a character as to raise the inference that intimacy must have existed prior to the separation. In the case at bar, a year and a half after plaintiff had sworn to a Bill for Divorce in which she alleged that her husband had completely and irreconcilably deserted her she saw her husband and defendant together in a public eating place.

The case of *Maahs vs. Schultz* (242 N. W. 195), decided by the Supreme Court of Wisconsin in 1932, is cited by plaintiff to state the law bearing upon the question of alienation of affections. Defendant submits the same case and respectfully shows that the

Appellate Court, in this case reversed a verdict of the jury for the plaintiff on the ground of insufficient evidence and defendant further submits that the facts in the cited case are much stronger than those appearing in the case at bar.

Maahs v. Schultz clearly sets forth the law as follows: "While many circumstances may contribute to the alienation of affections *there can be but one controlling cause*, and if the defendant is liable, his conduct must be '*the*' controlling cause. That is the way the rule is stated in three of our cases." Citing *Kadow v. Kadow* (195 Wis., 65, 219 N. W. 275), *McLery v. McLery* (186 Wis. 137, 202 N. W. 156), *Baird v. Carle* (156 Wis. 565, 147 N. W. 834). (Italics ours)

"Citations are of some value if it appear from them that on proof in essence neither stronger nor weaker than that present in the cited cases, it has been held either that there was or that there was not a case for the jury." (*Stillwell v. Stillwell*, 186 Iowa 177)

A review of the cited cases in which plaintiff was upheld shows that the facts were much stronger than those in the case at bar and constituted the controlling cause of the alienation of affections. None of the cases cited fairly compares with the one at bar. None of them is as skeletonized in its facts. In none is the hiatus so effective, complete and protracted as in the case at bar, which shows only to or three isolated and insignificant exchanges of civil amenities between defendant and plaintiff's husband occurring eight years prior to the filing by plaintiff of a bill for divorce during which period defendant not even as much as spoke to the plaintiff's husband. Whatever evidence was in-

troduced by plaintiff was by herself negatived on cross-examination by her admission that her marriage had not been happy up to 1932 as she had testified on direct; that her husband had often beaten her; that she had filed suit against her husband but did not mention defendant because she had no proof against her then and has no proof against her now (Rec. p. 10); that the desertion of her by her husband was final, complete and irreconcilable (Rec. p. 12); that the husband had wretchedly neglected his duties as a husband and a father (Rec. p. 13); that she did not have the picture defendant allegedly gave to plaintiff's husband, nor the letter allegedly written to him; that she never saw defendant in the car alone with her husband; that she did not know who stayed in Room 124 on the boat.

The husband testified that he lost all affection for his wife in 1923 when the youngest child was born and has had no affection for her ever since; that he never saw defendant from 1924 to 1932; that he had no sexual intercourse with his wife for about two or three years before they separated in 1932; that he had decided as early as 1924 that he had made a bad bargain but stayed with his wife on account of the children; that he had been hit by milk bottles, hurled by his wife, and unexpectedly bathed in dish water she had thrown at him.

And it should be further noted that defendant denied writing the alleged letter to Harry Fleming (Rec. p. 27) and Harry Fleming denied receiving such letter (Rec. p. 23) or any gifts from defendant (Rec. p. 23) nor defendant's picture, and neither is the letter or the picture in evidence. Defendant denies telephoning plaintiff's husband any time up to a year prior to the trial of this cause (Rec. p. 27), that Wil-

liam Fleming testified on cross-examination "that he had not seen her, Miss Fisk, for a number of years; had never spoken to her since he was six years old; that he is now eighteen years old; that almost ten years later he recognized her voice, although he had never spoken to her on the phone; that the incident when Mrs. Fisk asked him to leave his father and Marion alone took place twelve years ago but that he remembered it" (Rec. p. 17); that Lewis Fleming, another son of the plaintiff, testified on cross-examination "that he was three years old when the incident took place in the parlor; that he is now sixteen years old but remembers the occurrence; that he heard a voice over the telephone and identified it as Miss Fisk's; that he had never seen Miss Fisk for about twelve years up to the time that the call came in nor had he heard her voice" (Rec. p. 17); that Miss Fisk visited the plaintiff at the hospital in company with her father and mother; that Harry Fleming was at defendant's apartment on January 7, 1935 for the purpose of selling a car to some member of her family (Rec. p. 23) and that he denied that defendant told him to get rid of his wife (Rec. p. 23).

Maxwell's testimony does not help the plaintiff; he had no way of telling, he testified, who occupied Room 124 or Room 126 on the boat; that these rooms were not connected; neither is the testimony of the other witnesses of the plaintiff sufficient to justify the court to send this case to the jury.

The court is justified in directing a verdict

"where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out

a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this we think, is substantially the doctrine of the adjudged cases that control in this jurisdiction." (*Dodge v. Rush*, 28 App. D. C. 149); (*Adams v. Washington and G. R. Co.*, 9 App. D. C. 26); (*Ward v. District of Columbia*, 24 App. D. C. 524.)

In many cases where the facts are much more persuasive than those in the case at bar the court held that the plaintiff had not made out a cause of action sufficient for submission to the jury.

Maahs v. Schultz, 242 N. W. 195.

Bruce v. Galvin, 183 Iowa 145.

Maloney v. Phillips, 118 Iowa 9.

Heisler v. Heisler, 151 Iowa 503.

Avery v. Avery, 110 Iowa 741.

Corrick v. Dunham, 147 Iowa 320.

Rice v. Rice, 104 Mich. 371.

Musselem v. Frenn, 225 P. 370.

White v. Ely, 125 N. E. 174.

Comirand v. DeLude, 264 P. 355.

Stewart v. Hagerty (Sup. Ct. Pa., Jan. 3. 1916)

DeBock v. DeBock, 184, P. 890.

See also cases cited in 30 C. J. 1144, Sec. 1019, note 44 (a) and (b).

White v. Ely (125 N. E. 174) was an action by physician's wife against another woman for alienation of affections. The evidence disclosed that defendant and plaintiff's husband resided in the same house. At the close of the testimony defendant moved for a directed verdict which was denied. On appeal it was held the evidence was insufficient to submit the case to the jury, the motion for a directed verdict should have been granted, hence, reversed and judgment for defendant.

Stewart v. Hagerty, decided by the Supreme Court of Pa., Jan. 3, 1916. Plaintiff and her husband separated in 1907. There was some testimony that prior to separation defendant and plaintiff's husband were seen together. Under the circumstances defendant's conduct subsequent to separation was not admissible. This case was submitted to the jury but on appeal was reversed on the ground that the evidence was insufficient to show that the defendant was the active cause of the alienation.

In *Musselem v. Frenn* (225 P. 370), the court held the evidence insufficient and denied a rehearing, saying

“In order to sustain an action for the alienation of a husband's affections, it must appear, in addition to the fact of alienation that there has been a direct interference on defendant's part sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is upon the plaintiff to show such interference.”

The evidence in the case at bar clearly shows both by the conduct and the admissions of plaintiff and her husband that the affections of the husband became alienated in 1924, and by 1932 when plaintiff instituted her suit for divorce, the breach was admittedly irreconcilable, and that defendant's conduct was not the cause of such effect as the defendant was definitely out of the Fleming horizon during this period.

In *De Bock v. De Bock* (43 Calif. A. 283; 184 P. 890) the court held that even if it be admitted that a sentiment of love and affection developed between plaintiff's husband and defendant, sufficient to destroy the affections of the husband, and to alienate them from the wife, the defendant was not liable since the evidence did not clearly show that defendant was the aggressor, even though her acts had a tendency to alienate the affections.

Summary and Conclusion.

A brief summary of the evidence in the case at bar shows that during the years of 1921 to 1924 the only acts of alleged aggression charged to the defendant are that plaintiff's husband occasionally drove her to work in his car but always in company with her father or other members of the family; that defendant gave plaintiff's husband a picture of herself, the giving and receiving of which was respectively denied by defendant and plaintiff's husband. Plaintiff did not produce the picture at the trial. While a student at college, defendant allegedly wrote a letter to plaintiff's husband containing endearing words. Defendant and plaintiff's husband both denied respectively the sending and receipt of such letter, and the letter is not in evidence for the perusal of this court. There is a complete break in the evidence from 1924 to 1933 so far as the relations of the plaintiff's husband and the defendant are concerned. Not even one bit of testimony connects the defendant with plaintiff's husband during this period. Plaintiff's husband lost his affections for plaintiff in 1923 when the first child was born and never since that time did he have any affections for her but that he stayed with her for the sake of the children. That in 1932 plaintiff filed suit for separation against her husband in which she very conclusively shows that there was not a scintilla of affection between the two. It is noteworthy that nowhere in this Bill for Divorce is the defendant mentioned. Had the defendant been the cause of the alienation of the affections of plaintiff's husband, common sense requires that plaintiff would have so stated in her Bill for Divorce. Not until a year and a half after the separation does the evidence again attempt to link the defendant with plaintiff's husband.

But if it be assumed that affections which from 1924 to 1933 had been so completely and irreconcilably alienated can be any further alienated, the evidence subsequent to the separation connecting defendant with plaintiff's husband is itself meager and cannot be interpreted as constituting the controlling cause for the alienation of the affections of plaintiff's husband.

Bearing in mind that in order to maintain a cause of action for the alienation of affection, defendant's conduct must have been the procuring or controlling cause of the alienation (30 C. J. 1124); that defendant is not liable if the acts complained of did not alienate the affections of the husband or cause the separation (30 C. J. 1124); that defendant is not liable for any acts of affection by plaintiff's husband without wrongful inducement by defendant (30 C. J. 1124); that plaintiff must prove her case by a preponderance of the evidence (30 C. J. 1134); that there can be but one controlling cause, and if the defendant is liable, his conduct must be the controlling cause (*Maahs v. Schultz*, 242 N. W. 195); and that when, conceding the credibility of the witnesses, it is nevertheless plain that the plaintiff has not made out a case sufficient in law to entitle her to a verdict, the court is justified in directing a verdict for the defendant, it is respectfully submitted that the evidence in the case at bar is not sufficient to entitle plaintiff to a verdict and that therefore the trial court did not err in directing a verdict for the defendant.

Respectfully submitted,

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